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No. 89-1683

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1989

WATER POWER COMPANY, INC., *et al.*
Petitioners,

v.

PACIFICORP, *et al.*
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE OREGON COURT OF APPEALS

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QUESTION PRESENTED

Petitioners' statement of the question presented mischaracterizes the nature of this appeal. Respondent presents its own statement:

1. Do the Public Utilities Regulatory Policy Act (PURPA) and its implementing regulations authorize parties to agree to and to enforce terms such as those proposed by petitioners and adopted in the Purchase Power Agreement here?

PARTIES TO THE PROCEEDING

Petitioners' statement of the parties should be supplemented as indicated below.

Respondent PacifiCorp affiliates include Pacific Telecom, Inc., NERCO, Inc., Equitec Financial Group, Inc., EyeDentify, Inc., Flight Dynamics, Inc., and Arnav Systems, Inc.

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JURISDICTION

Respondent accepts petitioners' statement of the opinions below and jurisdiction.

STATUTORY PROVISIONS

Petitioners' citation of relevant statutory and regulatory provisions is incomplete and should be supplemented as indicated below.

Section 292.301(b)(2) of the Federal Energy Regulatory Commission's (FERC) regulations provides:

> "(b) *Negotiated rates or terms.* Nothing in this subpart:
>
> * * * * *
>
> "(2) Affects the validity of any contract entered into between a qualifying facility and an electric utility for any purchase." 18 CFR § 292.301(b)(2) (1989).

STATEMENT OF THE CASE

The facts are correctly stated in the opinion of the Oregon Court of Appeals. *Water Power Company, Inc. v. PacifiCorp*, 99 Or App 127, 127-130, 781 P2d 860 (1989). Petitioners' statement of the case is materially incomplete. The most significant of the facts omitted by petitioners concerns their role in initiating the contract they are attempting to avoid and the indispensability of that contract to petitioners' claim to 1982 prices.

At the time petitioners and respondent were exploring the proposed project in 1983, changes were occurring in the price respondent was required to pay for power purchased from qualifying facilities under PURPA. (Ex 8; Tr II, 404-05.) That price was determined by respondent's "avoided costs," which fluctuated depending upon projections of respondent's future power needs. Respondent notified all qualifying facilities with which it was negotiating in August 1983 (including petitioners) that power purchase agreements signed after September 30 would contain prices based on new, lower avoided costs approved by the Oregon Public Utilities Commission ("OPUC"). (Ex 206; Tr III, 521-23.)

Petitioners were eager to enter a power purchase agreement as soon as possible in order to lock in the higher prices before they expired. (Ex 207; Tr III, 525-26; Tr IV, 657, 697.) Their principal problem was that the project would be located some distance from respondent's electric utility system, so that petitioners were required to negotiate with other utilities to transmit the power to respondent. Petitioners therefore proposed a contract with a provision that "each of these project components [license, Interconnection Agreement, and Transmission Agreement] must be completed by a time certain or [respondent] may terminate the agreement." (Ex 207; Tr III, 526; Tr IV, 623.) Shortly after the September 30, 1983 deadline, OPUC was

asked to determine whether respondent was required to sign a power purchase agreement with the 1982 avoided cost prices. (Tr III, 530.)

OPUC ordered respondent to negotiate a power purchase agreement with the expired 1982 prices, provided that petitioners first identify in writing a plan for transmitting the power to respondent's system. (Ex 210; Tr II, 405; Tr III, 531-32.) Petitioners subsequently specified in late 1983 a transmission path through lines owned by Douglas Electric Cooperative and BPA, with the point of delivery to respondent at Cottage Grove, Oregon. (Ex 211; Tr III, 532-33.) In mid-1984, however, petitioners concluded they could save money by delivering power not at Cottage Grove, but instead at Fairview. (Tr IV, 757-58.)

Respondent acknowledged that Fairview might be a feasible point of delivery, but insisted that Cottage Grove remain as the principal delivery point. (Tr VI, 950-51.) Petitioners requested OPUC to order respondent to sign a power purchase agreement with the point of delivery left for designation in a later executed transmission agreement. (Ex 225.) OPUC refused, explaining that its earlier decision to require the higher 1982 prices was specifically based on its understanding that respondent and petitioners had established Cottage Grove as the point of delivery. (Ex 228.)

A final Power Purchase Agreement was signed by petitioners and respondent on November 28, 1984. The agreement provided in Article IX that, as "an express condition," petitioners "shall, pursuant to the transmission agreement, cause BPA to schedule and transfer all Net Delivered Output to Pacific at the Point of Delivery pursuant to the Transmission Agreement." (Ex 19.) Consistent with petitioners' original proposal and with OPUC's ruling, "Point of Delivery" was defined as

> "*** the location where Net Delivered Output is delivered to Pacific's system at BPA's Cottage Grove Substation, as specified in the Transmission Agreement, or at such other location as may reasonably be required by Pacific to allow Pacific to accept Net Delivered Output from BPA." (Ex 19.)

Similarly, the Power Purchase Agreement incorporated the petitioners' proposal, endorsed by OPUC, with respect to the timing of a transmission agreement meeting these requirements:

> "This Agreement shall not become effective until Sellers [Petitioners], Utility [Douglas], BPA, and Pacific have entered into the Transmission Agreement providing for firm transmission of electric power from the Facility to Pacific's system pursuant to, and under the constraints contained in, Article IX; *provided*, that if the Transmission Agreement has not been executed by all four parties prior to November 1, 1985, or if the Transmission Agreement has not been approved by the Rural Electrification Administration prior to November 1, 1986, this Agreement shall be null and void." (Ex 19.)

November 1, 1985 came and went without a transmission agreement being executed. Petitioners now seek to avoid the express condition of the contract.

REASONS FOR DENYING THE WRIT

I. Petitioners' Appeal Does Not Raise a Substantial Federal Question.

The Oregon Court of Appeals properly construed and applied the provisions of PURPA. In so doing, the court correctly held that PURPA does not limit the authority of a utility and a qualified facility to "'*** agree to a rate for any purchase, *or terms or conditions relating to any purchase, which differ from the rate or terms or conditions which would otherwise be required*'" under PURPA. *Water Power Company, Inc.*, 99 Or App at 131 (emphasis in original) (quoting 18 CFR § 292.301(b)(1)). Because the parties voluntarily entered into a contract governing petitioners' right to sell, and respondent's obligation to purchase, power at expired 1982 avoided cost rates, petitioners' appeal raises nothing more than state contract issues unique to the parties.

A. **PURPA and Its Implementing Regulations Empower Project Sponsors and Utilities to Establish by Contract the Rates, Terms, and Conditions Relating to Purchase.**

Under PURPA and its implementing regulations, the relationship between qualifying facilities and a utility may be left to the regulatory scheme, or may be established by agreement. The regulations not only provide that PURPA does not affect the validity of a contract between a qualifying facility and a utility, but also specifically provide that rates, terms, and conditions may be negotiated which differ from those otherwise required under PURPA. 18 CFR § 292.301(b); *see also Consolidated Edison Co. of New York, Inc. v. Public Service Com'n of New York*, 470 US 1075, 105 S Ct 1831, 85 L Ed 2d 132 (1985) (White, J., dissenting from dismissal of appeal). It was in light of this freedom to contract that the parties entered into the Power Purchase Agreement at issue here. The trial court and Oregon Court of Appeals correctly concluded that the terms of the Power Purchase Agreement control the rights of the parties.

In determining the true nature of this proceeding, it is critical to note that petitioners do not seek simply an agreement by respondent to purchase power from their proposed project. Rather, they seek a specific purchase at rates which expired generally in September 1983. The *only* basis for petitioners' claim to these high 1982 rates is the

terms and conditions agreed to between themselves and respondent in the Power Purchase Agreement.

The contractual nature of petitioners' claim was expressly recognized by OPUC. When petitioners sought to compel respondent to sign a contract with the point of delivery left for later designation, OPUC explained that petitioners' claim to 1982 prices was based entirely on the agreement of the parties that Cottage Grove would be the point of delivery:

> "If Loon Lake [i.e., petitioners] is now proposing to change the contract terms or specifications proposed in its January 30 [sic] letter, it would seem that Loon Lake was not ready to execute a purchase agreement at that time, and that September 1982 prices were inappropriate. Since Pacific is unwilling to agree to a change in the point of delivery, Cottage Grove should remain in the contract as the point of delivery." (Ex 228.)

The subsequent Power Purchase Agreement, which petitioners agreed to, effectuated the OPUC order. Petitioners and respondent specifically agreed that, for 1982 prices to apply, delivery had to be made at Cottage Grove and that petitioners, respondent, Douglas Electric Cooperative, and BPA had to enter a transmission agreement by November 1, 1985, or the Power Purchase Agreement would be null and void.

Petitioners now seek to avoid the contractual condition preventing their enforcement of 1982 rates on the basis that PURPA unconditionally requires respondent

to *purchase* energy from qualified facilities. In this regard, petitioners argue that the Oregon Court of Appeals misinterpreted PURPA to simply require respondent to *offer* to purchase energy. Petitioners' argument not only ignores the provisions of 18 CFR § 292.301(b), but is premised upon a misreading of the Oregon Court of Appeals' decision.

B. **The Oregon Court of Appeals' Accurately Construed and Applied PURPA Through Its Enforcement of the Parties' Contract.**

The error in petitioners' interpretation and application of PURPA is evident in petitioners' contention that the Oregon Court of Appeal's decision is in inherent conflict. Petitioners argue that while the court noted the fact that "[a]n electric utility must *purchase* power from a small power producer," it later held that PURPA regulations and rules require only that a utility *offer* to purchase power. (Petition for Writ of Certiorari, p. 7.) When the court's statements are read in context, it is apparent that the court correctly construed PURPA, recognizing that the obligation to purchase power may be contractually modified. The decision cannot be read to create a substantial federal question. *See Amer. Paper Inst. v. Amer. Elec. Pow. Serv. Corp.*, 461 US 402, 416, 103 S Ct 1921, 76 L Ed 2d 22 (1983) (recognizing qualifying facility and utility's right to negotiate rates).

The Oregon Court of Appeals recognized that "[a]n electric utility must purchase power from a small

power producer *at a rate no lower than its avoided cost* ***." The court's statement, however, was not an unconditional and all-encompassing statement of the law, but rather a means of defining "avoided costs" and a utility's obligation to publish avoided cost forecasts. *See* 99 Or at 127 n.3 (emphasis added).[1]

The Court of Appeals did not hold, however, that the obligation to purchase power may not be contractually modified. In this regard, the court correctly distinguished between the statutory obligation to purchase power and the right to contractually modify the obligation. The court held that "[u]nder the federal statute and regulations *** the parties may agree on terms or conditions in a power

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[1] Footnote 3 of the court's opinion provides in full:

> "An electric utility must purchase power from a small power producer at a rate no lower than its avoided cost, that is, 'the incremental costs to an electric utility of electric energy or capacity or both which, but for the purchase from the qualifying facility or qualifying facilities, such utility would generate itself or purchase from another source.' 18 CFR § 292.101(6); *see* ORS 758.505(1). The utility is required to forecast its avoided costs every two years, and the avoided cost schedules then serve to determine purchase rates from qualifying facilities. 18 CFR § 292.302(b); ORS 758.525(1) and (2)." 99 Or App at 127 n.3.

purchase agreement that vary from what is set forth in the regulations and rules." 99 Or App at 131-32. Further, the court correctly concluded that nothing in the Act prevents the parties from contracting on matters that the regulations and rules do not address, *i.e.*, the location of points of delivery or deadlines for transmission agreements. *Id.* at 132.

The Court of Appeals illustrated the distinction between the statutory obligation to purchase power and the right to contract through its comparison of this case to *Snow Mt. Pine Company v. Maudlin*, 84 Or App 590, 734 P2d 1366 (1987). In *Snow Mountain*, the parties had not been able to agree on contract terms. Consequently, the Court of Appeals considered whether, when the parties have not been able to agree on terms, PURPA and its implementing rules will determine for them if and when purchase will be required. The present case, in contrast, presents for consideration if and when purchase will be

required when the parties *have* agreed on terms.[2] In this context, the Court of Appeals declared:

> "Water Power relies on *Snow Mt. Pine Company v. Maudlin*, 84 Or App 590, 734 P2d 1366, *rev den* 303 Or 591 (1987), and asserts that 'the obligation to purchase power is imposed by law on a utility; it is not voluntarily assumed.' 84 Or App at 599. In *Snow Mt. Pine*, we also said that a utility's obligation 'is created by statutes, regulations and administrative rules.' 84 Or App at 598. Those statutes, regulations and rules require a utility to *offer* to purchase power from a qualifying facility, which includes a small power producer. The utility, however, is not required to purchase in any and all events and may insist on provisions that require that a transmission agreement be signed by a certain date and designate a particular point of delivery." *Water Power*, 99 Or App at 130.

In sum, the Court of Appeals correctly recognized that the parties' Power Purchase Agreement did not evade an obligation to purchase power at 1982 prices. Instead,

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[2] In this regard, petitioners reliance on *Afton Energy, Inc. v. Idaho Power Co.*, 107 Idaho 781, 693 P2d 427 (1984), is misplaced. In that case, the court simply held that a utility may be ordered to enter into a fixed term obligation to purchase power at avoided cost rates calculated at the time of delivery or at the time the obligation to deliver over a specified time is incurred. *Id.* at 433-34. The case does not support the proposition that a small producer is entitled under federal law to *expired* avoided cost rates. *See Empire Lumber v. Washington Water Power*, 114 Idaho 191, 755 P2d 1229 (1987), *cert denied*, 109 S Ct 228 (1988) (PURPA not intended to force utility to enter into contract to purchase power from small producer where location and capacity of proposed plant have yet to be specified).

the contract itself created and--unless certain mutually agreed conditions occurred--provided for the extinguishment of that obligation. When the specified conditions were not satisfied by the date agreed to, petitioners' claim to 1982 prices expired also. Thus, rather than misinterpreting PURPA, the court simply recognized the parties' right to contract as to the terms of any purchase. There is no inherent conflict in the opinion.[3]

C. **The Question Present Is Limited to State Contract Law and Does Not Have Importance Beyond the Parties to This Proceeding.**

Stripped to its essentials, this is an ordinary state breach of contract action. Federal law expressly authorizes utilities and small power producers to contract. Petitioners and respondent agreed to a contract. Petitioners thereafter sought to avoid the contract; respondent sought to, and two courts did, enforce it.

Nothing in this ordinary scenario merits the extraordinary step of United States Supreme Court review. Petitioners remain free to negotiate a new contract with

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[3] By way of footnote, petitioners appear to raise a policy argument that in order to provide developers proper "incentives," utilities should be required to forecast their avoided costs more than two years in advance. (*See* Petition for a Writ of Certiorari, p. 12 n.3.) Because petitioners' argument is in direct conflict with 18 CFR § 292.302(b), requiring utilities to forecast avoided costs every two years, it does not raise a substantial federal question.

respondent for the purchase of power or, absent a contract, to take all steps required to create an obligation to purchase based on PURPA and its regulations. It is apparent that petitioners have not done so because the rates applied would be today's rates and not the contractual avoided cost rate of 1982.

CONCLUSION

For the reasons set forth above, petitioners' Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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